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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA AT ANCHORAGE

UNITED STATES OF AMERICA for the use of NORTH STAR TERMINAL & STEVEDORE COMPANY, d/b/a NORTHERN STEVEDORING & HANDLING, and NORTH STAR TERMINAL & STEVEDORE COMPANY, d/b/a Northern Stevedoring & Handling, on its own behalf, Plaintiffs, and UNITED STATES OF AMERICA for the use of SHORESIDE PETROLEUM, INC., d/b/a Marathon Fuel Service, and SHORESIDE PETROLEUM, INC., d/b/a Marathon Fuel Service, on its own behalf, Intervening Plaintiffs, and METCO, INC., Intervening Plaintiff, vs. NUGGET CONSTRUCTION, INC.; SPENCER ROCK PRODUCTS, INC.,; UNITED STATES FIDELITY AND GUARANTY COMPANY; and ROBERT A. LAPORE, Defendants.	No. A98-009 CIV (HRH) REPLY IN SUPPORT OF NUGGET CONSTRUCTION, INC.'S AND UNITED STATES FIDELITY & GUARANTY CO., INC.'S MOTION FOR SUMMARY JUDGMENT AGAINST METCO, INC. AND SHORESIDE PETROLEUM, INC.

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Introduction

"The purpose of summary judgment, which has been described as having a 'special niche' in litigation, is to 'pierce the boilerplate of the pleadings and assay the parties' proof in order to determine whether trial is actually required." MOORE'S FEDERAL PRACTICE 3D, § 56.02 (citing *Wynne v. Tufts Univ. School of Medicine,* 976 F.2d 791, 794 (1st Cir. 1992), *cert. denied,* 507 U.S. 1030 (1993). In their Opposition to Nugget's dual motions for summary judgment ("Motions") against Metco's and Shoreside's state law claims, Metco and Shoreside fail to move beyond the "allegations" contained in their respective complaints and establish "proof" that they have viable claims against Nugget and USF&G.

In the simplest terms, Metco and Shoreside take no issue with any of the law provided by Nugget in its Motions. More importantly, however, Metco and Shoreside fail to provide any evidence to affirmatively establish the factual predicates required for them to sustain their state law causes of action or create a genuine issue of material fact that would require that the Motions be denied.

Instead, Metco and Shoreside continue to spin their delusions of "conspiracies" and "fraud" in the apparent hope that these baseless assertions will be sufficient to distract the court's attention from their failure to adequately oppose Nugget's Motions.

Perhaps most disturbing are the wholly fabricated ad hominem attacks on Nugget's counsel asserting that Oles Morrison either

orchestrated, perpetrated or participated in a conspiracy to defraud Metco, Shoreside, and/or North Star. Plaintiffs offer letters drafted with the assistance of Oles Morrison for purposes of defending Nugget as proof. Plaintiffs have provided no evidence that Nugget intended to defraud anyone, so how is it possible that its lawyers did? Certainly, counsel preparing or assisting a client with the drafting of a letter does not create a conspiracy to defraud, and plaintiffs cite no evidence or support to the contrary. This conclusion is especially true when the position presented on Nugget's behalf – that Spencer Rock was a supplier and not a subcontractor – was upheld by the Ninth Circuit.

Again, it is important to emphasize that there is not a scintilla of evidence to support claimants' assertion that Nugget entered into its arms-length transactions with Spencer Rock with the intention of (1) engaging in a conspiracy, (2) defrauding claimants, and/or (3) losing over $1.5 million in supporting Spencer Rock's contractual obligations (a fact that plaintiffs continue to ignore). Finally, the question of Nugget's intentions when entering into its transactions with Spencer Rock are immaterial to the pending state law claims; that question is only material to the federal implied-in-fact contract question, which is not the subject of Nugget's Motions.

The time has come to put an end to claimants' attempts to perpetuate their unsupportable allegations of state law claims, including the unfounded demand for punitive damages. As Metco and

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Shoreside have utterly failed to supply facts supporting their state law claims or to create any genuine issue of material fact as to the evidence provided by Nugget, Nugget is entitled to judgment as a matter of law on all state law claims. Therefore, Nugget's Motions should be granted.

I. STATEMENT OF FACTS

A. METCO'S AND SHORESIDE'S "FACTUAL DISCUSSION"

The section of Metco's and Shoreside's Opposition purporting to contain its "factual discussion" for purposes of responding to Nugget's Motions is little more than a lengthy extension of counsel's unsupported arguments from previous pleadings Metco and Shoreside have filed in this litigation. However, counsel's arguments alone are insufficient to defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249-252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Nowhere within this Section is there a single piece of admissible evidence supported by "the pleadings, depositions, answers to interrogatories, admissions on file" or any affidavits that establishes any of the various state law causes of action or that contradicts the facts set forth in Nugget's Motions. *See* Fed. R. Civ. Pro. 56 (c). As a result, Nugget's facts are unchallenged and can be accepted as true for purposes of these Motions.

1. Nugget's Activities And Inactivities

There is no attempt made by Metco and Shoreside to produce admissible evidence to support any of the contentions made in this section of their Opposition. The only attempt to reference something

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from the record is the inclusion of excerpts from purported letters from the Army Corps of Engineers to Nugget. These letters have not been provided to the Court, authenticated or properly attached to an affidavit or deposition testimony. Thus, they cannot be considered as part of the court's deliberation on the Motions.[1] However, even if considered by the court, they provide no support to Metco's and Shoreside's state law claims. Nugget's submission of pay applications and its discourse with the Corps regarding the Spencer Rock backcharges have no relevance to whether there was a contractual relationship between Nugget and plaintiffs, or whether Nugget was guilty of negligence on this project.[2]

Metco and Shoreside baldly assert that it is common construction industry practice to require a material supplier to post a payment bond to protect sub-suppliers. Plaintiffs offer no authority for this proposition, no doubt because, as a practical matter, such a position is nonsensical. Why would the general contractor pay the premium required for the material supplier to post a bond to protect sub-tier suppliers that have no Miller Act recourse against the general

[1] Metco and Shoreside have utterly failed to properly present their evidence in accordance with the strictures set forth in *Orr v. Bank of America,* 285 F.3d 764 (9th Cir. 2002) (unauthenticated documents cannot be considered in a summary judgment motion). In particular, the letters from the Corps have not been authenticated, or even provided, and therefore have no evidentiary value.

[2] The issue of Spencer Rock's backcharges was well known to the Corps and at no time did the Corps require Nugget to alter its pay applications because of that issue. Thus, despite plaintiffs' attempts to portray the backcharges as some injustice being perpetrated upon the Corps, after a series of letters explaining that Nugget was acting properly with regard to Spencer Rock and its sub-suppliers, the Corps took no further action on this subject.

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contractor in any event? This would only unnecessarily raise the general contractor's price to the government and put it at risk of losing the job. The Miller Act clearly sets forth the allocation of risk when it comes to sub-tier materialmen—i.e., for those entities, the statute considers them too remote for bond protection and they may look only to the first-tier supplier for payment. This is precisely the case with the claimants in this matter.

2. Shoreside's Activities

To support its factual assertions with regard to Shoreside's state law claims, Shoreside primarily relies on the deposition testimony of its own witness to promote its new found theory that it supplied the goods and services at issue in this litigation under two contracts simultaneously. Shoreside's argument goes like this: (1) Shoreside had a credit agreement with Spencer Rock, (2) Shoreside also had a credit agreement with Nugget, thus, (3) the delivery of goods to Spencer Rock create a contract between Shoreside and Spencer Rock and between Shoreside and Nugget. This unprecedented "dual contracts" theory is belied by Shoreside's own deposition testimony.

At no point in his deposition does Mr. Lechner, Shoreside's 30(b)(6) designee, state that there was a direct contractual relationship between Shoreside and Nugget for the goods and services provided to Spencer Rock. All Shoreside does in its Opposition is attempt to argue an inference that such a relationship existed, despite the testimony to the contrary. The true nature of Shoreside's understanding of its contractual relationship for this project,

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however, is summed up by the following testimony from Shoreside's vice president and 30(b)(6) deponent:

> Q. So in other words, in your mind, your contract was with Spencer Rock, but you had a bond in place in case Spencer Rock failed to pay you. Is that a fair summary?
>
> A. I think that's a fair assessment."

Nugget Motion Against Shoreside (Docket No. 481), Krider Aff., Ex. 1, Lechner Dep., p. 24, ln. 8-11 (Docket No. 482).

Even the leading testimony Mr. Lechner provided to his counsel during his deposition, which Shoreside cites in its Opposition, confirms that Shoreside believed its contract to be with Spencer Rock, and only Spencer Rock:

> Q. And at the time of this contract, who did you understand you would be providing fuel to at the Spencer pit?
>
> A. For the Spencer pit project, Spencer Rock was supposedly going to be doing rock work out there at the quarry, and that's who we'd be delivering the fuel to for this initial part of the project.
>
> Q. Who did you understand would be paying for the fuel delivered at the Spencer Rock quarry?
>
> A. At the time, Spencer Rock was the company that we were billing the invoices to. But we did know that Nugget Construction was the general contractor.
>
> Q. During the initial contact for the delivery of the rock—or the delivery of fuel to the quarry, did Mr. LaPore or Mr. Randolph ever indicate that Nugget was going to guarantee payment of the billings to Spencer Rock for the fuel?
>
> A. The only thing that was mentioned about Nugget's payment was when Bob LaPore said he was getting paid by Nugget to pay for his – for the portion of fuel – he'd be paying directly – being paid directly by Nugget.
>
> ***

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> Q. (by Shoreside's counsel) In response to some questions from Mr. Machetanz you were talking about the credit practices. Is it possible that credit was extended in this case because Shoreside was confident it would be paid from one of the parties that it could look to for payment?
>
> A. Well, again, I'll repeat what I've said all along, is, we did look to the general contractor, as a bonded project, for payment.

Metco and Shoreside Opposition, pp. 11-12, 19-20 (objection omitted).[3]

The statement that Shoreside looked to Nugget, as the general contactor on a bonded project, for ultimate payment is a far cry from Shoreside believing there was a direct contractual relationship between Nugget and Shoreside for the goods and services provided to Spencer Rock. Nothing in Mr. Lechner's deposition testimony supports Shoreside's state law claims. Moreover, Shoreside's feeble attempt to concoct its "dual-contract" theory is without a shred of factual or legal support and, in fact, is defeated by the evidence, including the testimony of its own corporate designee, on which Shoreside so strenuously relies.

3. Metco's Activities

Remarkably, on pages 22-23 of its Opposition, Metco takes no exception to Nugget's facts as set forth in the Motions. More importantly, Metco's statements alleging additional facts to those presented by Nugget fail to establish any of the elements required to maintain Metco's state law claims. Metco fails to offer a single statement demonstrating either a direct contractual relationship

[3] Nugget renews its objections to the testimony provided in the deposition excerpts as specified therein.

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between Metco and Nugget on the project, or that Metco relied on any action of Nugget. Instead, all of the relevant references in this section relate to Metco's contract with Spencer Rock. Indeed, Metco's only argument, the significance of which the Ninth Circuit considered and dismissed, is that Metco made the erroneous assumption that it would be covered by Nugget's bond.

For purposes of the court's consideration of Metco's Opposition, Metco has truly provided no evidence, as none of its statements are in the form required under Rule 56. Fed. R. Civ. P. 56; *Orr v. Bank of America, supra.* Thus, in the absence of any substantive argument, and because Metco has utterly failed to adhere to the procedural requirements of either *Celotex* or *Orr*, the Court has no choice but to grant Nugget's Motion against Metco.

II. Legal Argument

A. SUMMARY JUDGMENT STANDARD OF REVIEW

Rule 56(c) of the Federal Rules of Civil Procedure instructs that a motion for summary judgment shall be "rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there are no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Federal summary judgment procedure requires the piercing through the pleadings and their adroit craftsmanship to reach the substance of the claim. *See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986).

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Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, then there is no genuine issue for trial. *See id.* Accordingly, "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

The Supreme Court addressed a nearly identical situation to the one presented in Metco's and Shoreside's Opposition – i.e., one in which the plaintiff failed to provide evidence supporting the essential elements of its claim – in the case of *Celotex v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The Court held:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Id. at 322-23.

As was the case with the plaintiff in *Celotex*, Metco and Shoreside bear the burden of proof at trial with regard to their state law claims. Also similar to the *Celotex* plaintiff, Metco's and Shoreside's respective inability to produce evidence establishing a

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factual basis for their claims renders those state law claims subject to summary dismissal. "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose." *Id.* at 323-24. That is precisely what this Court should do with respect to plaintiffs' state law claims.[4]

B. METCO'S AND SHORESIDE'S LEGAL DISCUSSION SECTION DOES NOT PROVIDE ANY BASIS FOR DENYING THE MOTIONS

Given Metco's and Shoreside's failure to produce any evidence supporting the essential elements for their state law claims, it is not surprising that they did not provide any citation to the records in this case in support of their legal positions. Instead, Metco and Shoreside do little more than repeat for the Court the same legal authority set forth in Nugget's Motions and then recite conclusory statements in lieu of actual facts to support their claims. Nugget's and USF&G's Motions establish a factual record that not only proves the absence of material facts supporting plaintiffs' claims, but also that contradicts the assertions made in the respective Amended Complaints. The deponents for both Metco and Shoreside acknowledge that their contracts were with Spencer Rock, and not Nugget, and that

[4] In its response to Nugget's and USF&G's Motion for Summary Judgment on North Star's State Law Claims, North Star attempts to lend a helping hand to the other claimants by stating that much of its Opposition also applies to them. North Star's Opposition (Docket No. 535) at p. 4. However, as with cross motions for summary judgment, each parties' Opposition must stand on its own in terms of its evaluation under Fed. R. Civ. P. 56. *Alioto v. United States*, 593 F. Supp. 1402, 1413 (N.D. Cal. 1984). Thus, Metco and Shoreside must survive or fail on their own merits.

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they only looked to Nugget because there was a bond in place that they erroneously believed covered them. Under these facts, there exist no state law causes of action.

1. Breach of Contract

Metco and Shoreside make no effort to establish a contractual relationship between themselves and Nugget, other than through counsel's argument. Instead, plaintiffs attempt to turn contract law on its head by arguing that Nugget was contractually bound because "Nugget did not exhibit any conduct to manifest an intent not to be bound under the circumstance." Opposition at p. 25. Under plaintiffs' approach, contracts exist between parties unless or until one of the parties overtly denounces the contract. Surely such an approach only exists when one travels *Through the Looking Glass*. Unfortunately, to establish the existence of a contract under Alaska state law, Metco and Shoreside must show (1) an offer that encompasses the agreement's essential terms, (2) unequivocal acceptance, (3) consideration, and (4) a mutual intent to be bound. *See Midgett v. Cook Inlet Pre-Trial Facility*, 53 P.3d 1105 (Alaska 2002).

Metco and Shoreside also argue that contracts were formed when they supplied copies of their invoices to Nugget without Nugget renouncing them. Not only do they cite no authority indicating that a contract is formed when one party asks to see the invoices previously presented to a third-party, but they also neglect to tell the Court that the invoices were provided after both had ceased performing work for Spencer Rock. Nugget Motion Against Metco, Krider Aff., Ex. 1, p.

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21, ln. 4-17, and p. 30, ln. 12 through p. 31, ln. 4; Nugget Motion Against Shoreside, Krider Aff., Ex. 1, p. 25, ln. 7-18 ("Q But when you had these discussions with Randy Randolph, did Randy Randolph ever indicate to you that Nugget would pay for [the goods supplied by Shoreside to Spencer Rock]? A The one conversation I had when I asked him, he said that they wouldn't pay for them.").

There is no evidence that a contract – oral, written, express or implied – was ever entered into between Nugget and Shoreside or between Nugget and Metco for the goods and services they provided to Spencer Rock for this project. Without an "agreement" or "meeting of the minds" between Nugget and plaintiffs, there is no basis for finding a contract. Neither Metco nor Shoreside present any facts supporting the assertion of an "agreement" or "meeting of the minds" between them and Nugget– i.e., a mutual intent to be bound. Accordingly, Metco's and Shoreside's state law contract claims should be dismissed.

2. Quasi-Contract

Metco and Shoreside do not dispute the Alaska law holding that one cannot recover under a theory of "quasi-contract" when there is an express contract covering the transaction. Plaintiffs acknowledge that they are not entitled to such a recovery if an express contract is found between them and Nugget. However, plaintiffs ignore the established fact that there was an express contract between each of them and Spencer Rock. As such, there is no legal or factual basis for this claim against Nugget.

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3. Promissory Estoppel

After citing Nugget's authority controlling promissory estoppel claims, Metco and Shoreside fail to articulate: (1) what action by Nugget induced them to substantially change their positions, (2) what positions were in fact changed, or (3) what actual promise was made by Nugget to either of them. Plaintiffs' statement to the effect that the first three elements of this claim are "present in this case" are merely conclusory and do not substantiate this claim. Equally fallacious is plaintiffs' argument that "enforcement is necessary in the interest of justice." In the absence of any facts to refute Nugget's argument, it is no surprising that plaintiffs must resort to vague and unsubstantiated equitable notions involving the "interest of justice." As is true of its other meritless claims, this cause of action should be dismissed. *Celotex, supra.*

4. Detrimental Reliance

As with promissory estoppel, plaintiffs make no showing as to how the elements of their detrimental reliance claim are supported by the facts in the record. The only "reasonable reliance" plaintiffs have ever articulated relates to their unfounded belief that they were covered by the Miller Act payment bond. However, this legally erroneous belief cannot possibly be deemed "reasonable" for purposes of establishing a cause of action between plaintiffs and Nugget in view of the Miller Act's express language and historical interpretation, which shields the general contractor from such distant and tenuous claims.

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5. Negligent Misrepresentation

Once again, Metco and Shoreside have made no attempt to set forth any facts to establish the necessary elements of their negligent misrepresentation claim. In fact, plaintiffs have never alleged an affirmative misrepresentation on the part of Nugget in this case; they have only relied on the non-disclosure of the Support Agreement as the basis for an "omission" claim. Metco's and Shoreside's claims for negligent misrepresentation are unsupported and should be dismissed.

6. Fraudulent Misrepresentation and Non-Disclosure

Without any factual support or legal authority, Metco and Shoreside argue that the Support Agreement between Nugget and Spencer Rock "was illegal and void as a matter of law to the extent it is interposed by Nugget to justify non-payment to the three claimants." This argument is nothing more than a re-iteration of plaintiffs' "strawman" theory under their Miller Act claims, and is not pertinent to the discussion of the state law cause of action for non-disclosure. In order for Nugget to be liable for the non-disclosure of the Support Agreement, plaintiffs must establish that there was a special relationship between them and Nugget, such that a duty exists that requires disclosure. *Hagans, Brown & Gibbs v. First Nat. Bank of Anchorage*, 810 P.2d 1015, 1019 (Alaska 1991). Plaintiffs have made no showing demonstrating the existence of a special relationship and have cited no authority creating a duty of disclosure by Nugget. Thus, this claim should also be dismissed.

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7. Negligence

Even though Metco and Shoreside spend a large part of their Opposition discussing the issue of negligence, they fail to cite any authority supporting the existence of a duty between Nugget and the plaintiffs. In fact, Metco and Shoreside simply rely on the exact same authority cited in Nugget's Motions. Because plaintiffs are unable to provide any authority for the imposition of a duty in this case, Metco and Shoreside ask the court to create one out of whole cloth – "This court can identify a class of cases to which its ruling would apply namely the claimants who provide goods and perform services for the use and benefit of a federal project." Opposition at 28.

Ostensibly, plaintiffs are asking this court to create a duty between a general contactor and a sub-tier materialman to ensure payment to the latter. Of course, the federal Miller Act pre-empts any such duty when it comes to defining the relationships and obligations between contractors and materialmen on a federally funded project. In this case, the Ninth Circuit, in interpreting the Miller Act, held that there was no obligation for Nugget and/or USF&G to pay the claimants on behalf of Spencer Rock, because of Spencer Rock's status as a materialman.

The imposition of a common law, tort duty on the part of Nugget to ensure payment to sub-tier materialmen providing goods and services to a first-tier materialman would be unprecedented and would completely undermine the traditional notions of contractual privity.

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The "duty" plaintiffs seek to impose is really nothing more than what is already handled under the Miller Act through the "strawman" line of cases. However, under the Miller Act, the analysis remains in contract and not tort, as the "strawman" theory is predicated on federal implied-in-fact contract law. The imposition of a tort duty on the general contractor to a sub-tier materialman would also undermine the express language and purpose of the Miller Act, which does not permit punitive damages. Plaintiffs have not set forth any factual or legal basis for establishing a new cause of action sounding in tort, and the Court should not accept plaintiffs' invitation to do so.

The problem of attempting to mix Miller Act and tort claims was previously discussed in the case of *Allied Building Products Corp. v. Federal Insurance Company*, 729 F.Supp 477 (D.Md. 1990). In that case, the District Court denied plaintiff's motion to amend its complaint to allege new tort claims. In denying the request, the court stated:

> Finally, the Court notes that the Miller Act was intended as a simple remedy for unpaid subcontractors on federal building projects. The essence of the Miller Act is a breached contractual obligation. To allow such a case to turn into a tort case would frustrate the purpose of the Miller Act by complicating the litigations immensely. Therefore, the Court would not, in the exercise of its discretion, entertain the sort of pendent claims sought here to be asserted, even if they had merit *prima facie*.

Id. at 479. In addition, the court also dismissed plaintiff's punitive damages claims, as no tort claims existed to which the punitive damages could attach.

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The District Court's view of the inappropriate mixing of Miller Act and tort claims was cited favorably by the Eleventh Circuit in the case of *Krupp Steel Products, Inc. v. Aetna Insurance Company*, 923 F.2d 1521 (11th Cir. 1991).

In advancing their argument for the imposition of a duty, plaintiffs state that motor vehicle claims prove that there need not be privity for recovery of "pure economic loss." However, "economic loss," as discussed in Nugget's Motions, deals only with instances where there is no personal injury or property damage; e.g., lost profits, re-procurement costs, etc. The "economic loss rule" dictates that losses of a purely financial nature, like the ones sought by plaintiffs in this case, are not recoverable in tort. *See Berschauer Phillips Construction Co. v. Seattle School District No. 1*, 881 P.2d 986 (Wash. 1994). Under plaintiffs' argument, in addition to creating a duty in federal contracting, they also seek to impose a duty on every contracting party to insure that any lower tier entity in the chain of privity is paid. It perhaps goes without saying that there is absolutely no authority for this proposition, and this Court should decline to adopt plaintiffs' proposed unlimited scope of duty.

Without the existence of a duty, the remaining analysis of whether a party committed negligence is unnecessary. Plaintiffs, however, in conclusory fashion, march through the seven factor test and insist that they apply to this case. There is again no factual citation or legal authority supporting their position. The one factor worth commenting on relates to the notion that insurance is available

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for these claims. First, there is no affidavit or deposition transcript supporting any of the statements attributable to Mr. Ferguson or Mr. Smithson. Even without this deficiency, there is nothing indicating that there is insurance coverage, only that plaintiffs have undertaken substantial efforts hoping to find coverage. To date, no carrier has accepted coverage for plaintiffs' claims.

8. Unjust Enrichment, Restitution, Quantum Meruit

After agreeing with Nugget's assessment of the law on these subjects, Metco and Shoreside make no effort to contradict the evidence provided by Nugget that it lost in excess of $1.5 million in its dealings with Spencer Rock. Nor do plaintiffs contradict Nugget's payment to Spencer Rock of more than $197,000. The fact that plaintiffs performed their services and supplied their goods to Spencer Rock is undisputed. As such, it is Spencer Rock was most certainly unjustly enriched by plaintiffs, not Nugget. In reality, Spencer Rock's incompetence caused all of the parties dealing with it to lose money on this project, and the foremost among them was Nugget.

Plaintiffs also complain about the assertion of Nugget's losses being provided in a perfectly valid affidavit, which is ironic given the utter lack of proper evidence in the Opposition. However, although plaintiffs have had access to Nugget's financial information for this project and have taken several depositions during which the project's financial performance was discussed, they have provided not one fact to dispute Nugget's losses. As such, there is no evidence

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supporting the contention that Nugget was unjustly enriched by plaintiffs' actions.

9. Equitable Subordination

Metco and Shoreside have failed to identify any facts or legal authority to establish their claims for equitable subordination, and based on the analysis provided in the Motions, this claim should be denied.

10. Constructive Trust

Metco and Shoreside have failed to identify any facts or legal authority to establish their claims for constructive trust, and based on the analysis provided in the Motions, this claim should be denied.

11. Agency

In Opposition to Nugget's Motions, Metco and Shoreside appear to simply adopt North Star's Motion for Summary Judgment on Agency as their defense. To the extent plaintiffs seek to rely on a federal law of agency relating to their Miller Act claims, that claim is no different than their "strawman" claims. Plaintiffs have already once before asserted against Nugget claims relative to the alleged existence of an agency relationship under the Miller Act between Nugget and Spencer Rock, and the Ninth Circuit held that plaintiffs failed to adduce evidence sufficient to prevail on summary judgment. Nugget has addressed North Star's Motion in its recently filed Opposition. However, those arguments are separate and distinct from any claims plaintiffs are making pursuant to Alaska law.

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It is not clear from their Opposition whether Metco and Shoreside are continuing to make state law agency claims. To the extent they are, they have made no effort to establish the factual and legal predicates for such a claim. In addition, they have made no attempt to distinguish the authority cited by the Court in its August 30, 2002 Order (Docket 310); i.e., that under Alaska law, an undisclosed principal is not liable for the actions of the agent. Further, the court found no evidence of an agency relationship between Nugget and Spencer Rock, but stated that if an agency relationship existed, Nugget could not be responsible, as it was undisclosed.

As set forth in Nugget's Motions, plaintiffs' state law agency claims should be dismissed.

12. Punitive Damages

In their Opposition, Metco and Shoreside mistakenly argue that the burden is on Nugget to establish that plaintiffs are not entitled to punitive damages. However, under *Celotex*, the burden of establishing the existence of conduct that was so outrageous as to warrant punitive damages is on the plaintiffs. Plaintiffs fail to provide any evidence of malicious behavior on Nugget's part.

"[W]here there is no evidence that gives rise to an inference of actual malice or conduct sufficiently outrageous to be deemed equivalent to actual malice, the trial court need not submit the punitive damages issue to the jury. Indeed, submitting the issue to the jury in such a situation may constitute reversible error." *Alyeska Pipeline Serv. Co.*, 645 P.2d 767, 774 (Alaska 1982).

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In this case, Nugget entered into a material supply contract with Spencer Rock. When Spencer Rock asked Nugget for support to help it meet its contractual obligations to Nugget, Nugget and Spencer Rock entered into a support agreement to allow Nugget to deduct from Spencer Rock's progress payments the cost of Nugget's efforts in helping Spencer Rock. *See* Motions and accompanying affidavits. There is no evidence to suggest that Nugget entered into the Support Agreement with the intention of it costing Nugget well in excess of Spencer Rock's contract value, such that it would lose $1.5 million and that the claimants would not be paid by Spencer Rock. Under these circumstances, plaintiffs' punitive damages claims are legally insufficient to be allowed to be presented to the jury and should be dismissed.

III. CONCLUSION

Given Metco's and Shoreside's fundamental failure to properly respond to Nugget's Motions by satisfying their burden of demonstrating the factual support for their state law claims, the court should have little difficulty in dismissing those claims. However, it is important to note that, even if plaintiffs had made the effort to respond to Nugget's Motions, the result would be the same. Metco's and Shoreside's state law claims are simply unfounded in this case. That even plaintiffs know this to be true is evident by the virtual absence of state law claims prior to the Ninth Circuit's decision finding Spencer Rock to be a materialman and not a subcontractor. In addition, the tort claims that were added last

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year, including the punitive damages claim, are nothing more than a thinly veiled attempt to recover sums this court and the Ninth Circuit have held are not recoverable under plaintiffs' Miller Act claims.

The time has come to rid this case of the superfluous claims brought by plaintiffs and try the only issue that is relevant to the true dispute in this case; i.e., whether Spencer Rock was a "strawman" on this project. The answer to that question at trial will ultimately be no. However, there is no reason to burden the parties or the Court with the time and expense of litigating a dozen separate state law claims that lack factual support. For the reasons set forth above, Nugget and USF&G ask the court to dismiss all of Metco's and Shoreside's state law claims.

Dated: May 22, 2006

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of May, 2006, a true and correct copy of the foregoing was served

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